IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 7, 2008

MICHAEL V. MORRIS v. JAMES FORTNER, WARDEN

Direct Appeal from the Circuit Court for Hickman County
No. 08-5016C Robbie T. Beal, Judge

No. M2008-01022-CCA-R3-HC - Filed February 26, 2009

Petitioner, Michael V. Morris, appeals the habeas court's summary dismissal of his petition for writ of habeas corpus in which he alleged that the trial court erroneously classified him as a career offender and sentenced him in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. He also questioned the overall constitutionality of the Tennessee Sentencing Act insofar as it authorized the trial court to sentence him beyond that reflected in the jury verdict. Petitioner additionally argues on appeal that the trial court violated *ex post facto* prohibitions by sentencing him under the 2005 Sentencing Act. After a thorough review, we affirm the judgment of the habeas corpus court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. MCLIN, JJ., joined.

Michael V. Morris, Only, Tennessee, *Pro Se*.

Robert E. Cooper, Jr., Attorney General and Reporter; and David H. Findley, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

I. Background

Petitioner was convicted in 2006 of one count of aggravated robbery, a Class B felony, and was sentenced as a career offender to thirty years in confinement served at sixty percent. *State v. Michael V. Morris*, No. M2006-02738-CCA-R3-CD, 2008 WL 544567, at *1 (Tenn. Crim. App., at Nashville, Feb. 25, 2008), *perm. to appeal denied* (Tenn. Aug. 25, 2008), *reh'g denied* (Tenn., Sept. 22, 2008). Petitioner filed a *pro se* petition for writ of habeas corpus relief in which he argued that the trial court erred in failing to "authenticate[]" his prior convictions in "type and number" and in using those prior convictions to sentence him as a career offender. He argued that the trial court's enhancement of his sentence violated his constitutional right to have a jury determine

"such increase in terms of sentencing" as set out in *Apprendi*, 530 U.S. 466, and *Blakely v. Washington*, 542 U.S. 296 (2004). He further argued that the Tennessee Sentencing Act was unconstitutional in that it "allows judges to do what the U.S. Supreme Court says is illegal." The State filed a motion to dismiss the habeas corpus petition arguing that Petitioner's claims did not render the judgment void, and the habeas court granted the State's motion without the appointment of counsel and without an evidentiary hearing. On appeal, Petitioner argues that the habeas court erred in summarily dismissing his habeas corpus petition. He also argues, for the first time on appeal, that his sentence was imposed in violation of *ex post facto* prohibitions because he did not sign a waiver to be sentenced under the 2005 sentencing amendments.

II. Standard of Review

The right to habeas corpus relief is available "only when 'it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered' that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." *Summers v. State*, 212 S.W.3d 251, 255 (Tenn. 2007) (quoting *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993)). In contrast to a post-conviction petition, a habeas corpus petition is used to challenge void and not merely voidable judgments. *Summers*, 212 S.W.3d at 255-56. "A voidable judgment is one that is facially valid and requires proof beyond the face of the record or judgment to establish its invalidity." *Id.* at 256 (citing *Dykes v. Compton*, 978 S.W.2d 528, 529 (Tenn. 1998)). "A void judgment is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment." *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999); *Dykes*, 978 S.W.2d at 529.

A petitioner bears the burden of proving a void judgment or illegal confinement by a preponderance of the evidence. *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000). A trial court may summarily dismiss a petition for writ of habeas corpus without the appointment of counsel and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *See Summers*, 212 S.W.3d at 260; *Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004).

The determination of whether habeas corpus relief should be granted is a question of law. *Summers*, 212 S.W.3d at 255; *Hart v. State*, 21 S.W.3d 901, 903 (Tenn. 2000). "Therefore, our review is *de novo* with no presumption of correctness given to the findings and conclusions of the lower courts." *Summers*, 212 S.W.3d at 255; *State v. Livingston*, 197 S.W.3d 710, 712 (Tenn. 2006).

III. Analysis

On appeal, Petitioner first argues that the trial court erroneously classified him as a career offender and violated his right to a jury trial, as elucidated in *Apprendi* and *Blakely*, by enhancing his sentence without the jury making such determination. We note that throughout his petition Petitioner refers to his being sentenced as a career offender in terms of his sentence being "enhanced." It does not appear from the record before us that the trial court applied enhancement

factors from Tennessee Code Annotated section 40-35-114 to enhance Petitioner's sentence, but instead, that Petitioner's aggrievement in this regard is that the trial court erroneously sentenced him as a career offender and did so without the jury making such determination.

We note that Petitioner failed to attach copies of the challenged prior judgments to his petition which justifies the habeas court's summary dismissal of the petition. *See Summers*, 212 S.W.3d at 261. Moreover, even if the trial court erroneously classified him as a career offender, such would not render his sentence void. *See Edwards v. State*, 269 S.W.3d 915 (Tenn. 2008); *see also Jasper Lee Vick v. State*, No. W2006-02172-CCA-R3-HC, 2008 WL 80580, at *2 (Tenn. Crim. App., at Jackson, Jan. 8, 2008); *Gregory Scott Spooner v. State*, No. E2004-02160-CCA-R3-HC, 2005 WL 1584357, at *1 (Tenn. Crim. App., at Knoxville, July 7, 2005), *perm. to appeal denied* (Tenn., Dec. 5, 2005). In addition, this court has repeatedly held that *Apprendi* or *Blakely* violations do not render judgments void. *See, e.g.*, *Billy Merle Meeks v. Ricky J. Bell, Warden*, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486, at *7 (Tenn. Crim. App., at Nashville, Nov. 13, 2007) *perm. to appeal denied* (Tenn., Apr. 7, 2008), *cert. denied*, __ U.S. __, __ S. Ct. __ (Jan. 12, 2009); *Ulysses Richardson v. State*, No. W2006-01856-CCA-R3-PC, 2007 WL 1515162, at *3 (Tenn. Crim. App., at Jackson, May 24, 2007), *perm. to appeal denied* (Tenn., Sept. 17, 2007); *Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594, at *3 (Tenn. Crim. App., at Nashville, May 1, 2007). Furthermore, no *Apprendi* or *Blakely* violation occurred if the trial court enhanced Petitioner's sentence based on prior convictions. *Blakely*, 542 U.S. at 301 (citing *Apprendi*, 530 U.S. at 490).

Addressing Petitioner's claim that the Tennessee Sentencing Act was unconstitutional in light of *Apprendi* and its progeny, we note *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007), in which our supreme court held that:

> Applying *Cunningham* [*v. California*, 549 U.S. 270 (2007)], we conclude that the [Tennessee Criminal Sentencing Reform Act of 1989] failed to satisfy the Sixth Amendment insofar as it allowed a presumptive sentence to be enhanced based on judicially determined facts. That is, to the extent the Reform Act permitted enhancement based on judicially determined facts other than the fact of a prior conviction, it violated the Sixth Amendment [right to a jury trial] as interpreted by the Supreme Court in *Apprendi*, *Blakely*, and *Cunningham*.

Id. at 740 (footnote omitted). Nevertheless, the preceding would not render Petitioner's conviction void because any "enhancement" in this case was apparently based on his prior convictions, and even if based on other judicially determined facts, such would only render the judgment voidable, not void. *See Billy Merle Meeks*, 2007 WL 4116486, at *7; *Ulysses Richardson*, 2007 WL 1515162, at *3; *Timothy R. Bowles*, 2007 WL 1266594, at *3.

Petitioner lastly argues that his sentence was imposed in violation of *ex post facto* prohibitions because the offense was committed on August 8, 2004, and he was sentenced on September 6, 2006, but did not sign a waiver to be sentenced under the 2005 sentencing

amendments. With regard to this claim, it does not appear that Petitioner raised the issue in his original petition and cannot raise it for the first time on appeal. *See Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983). Second, even assuming Petitioner had properly raised the claim, he has offered no evidence that he was, in actuality, sentenced under the 2005 amended sentencing act, and such is not discernible from the record before us. It is Petitioner's burden to prove that his allegations are true. *See Summers*, 212 S.W.3d at 262. Third, the provisions of the sentencing act regarding career offenders were not materially changed by the 2005 sentencing amendments and would have made no impact on Petitioner's sentence. *See* T.C.A. § 40-35-108 (amended 2005 Pub. Acts, c. 353, § 4). Fourth, even further assuming Petitioner was sentenced under the 2005 sentencing amendments without having waived his *ex post facto* protections, we have previously held that "constitutional infirmities create voidable judgments not void judgments unless the face of the record establishes that the trial court did not have jurisdiction to convict or sentence the petitioner." *See Wayford Demonbreun, Jr. v. State*, No. M2004-03037-CCA-R3-HC, 2005 WL 1541873, at *2 (Tenn. Crim. App., at Nashville, June 30, 2005), *perm. to appeal denied* (Tenn., Oct. 31, 2005) (citing *Luttrell v. State*, 644 S.W.2d 408, 409 (Tenn. Crim. App. 1982); *Earl David Crawford v. Ricky Bell, Warden*, No. M2004-02440-CCA-R3-HC, 2005 WL 354106, at *1 (Tenn. Crim. App., at Nashville, Feb. 15, 2005), *perm. to appeal denied* (Tenn., June 27, 2005)); *see also Luther E. Fowler v. Howard Carlton, Warden*, No. E2004-01346-CCA-R3-HC, 2005 WL 645206, at *5-6 (Tenn. Crim. App., at Knoxville, Mar. 21, 2005), *perm. to appeal denied* (Tenn., June 27, 2005). As such, Petitioner is not entitled to habeas corpus relief.

CONCLUSION

After a thorough review, we affirm the judgment of the habeas corpus court.

_____

THOMAS T. WOODALL, JUDGE